KERAJAAN MALAYSIA

v.

GLOBAL INSURANCE CO SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: R1-12-139-97]
25 SEPTEMBER 1998

REVENUE LAW: *Interpretation of Income Tax Act 1967 - Section 83(3) - Whether precludes employer from amending Form CP22A*

REVENUE LAW: *Interpretation of Income Tax Act 1967 - Section 83(3) - Notice to Inland Revenue of employee leaving employment - Whether amount of money due to employee withheld by employer must also be furnished - Whether s. 83(5) requires such information - Application of s. 107(4) - Whether upon failure to give notice under s. 83(3) & (5)*

In this instance, the appellant appealed against the decision of the trial judge who held that the Form CP22A submitted by the respondent to the appellant could be amended.

In an earlier Form CP22A submitted to the appellant, the respondent stated that it had in its possession a sum of money on account of its employee who was to leave its employment. The director general for the appellant then directed the respondent to transmit to him a certain amount of the said sum of money and release the rest to the employee concerned. Subsequently, the respondent submitted an amended Form CP22A, claiming an error in the earlier like form that was submitted and that there was no money belonging to the employee concerned in its possession.

The appellant contended that if such an amendment was permitted the purpose of ss. 83(5) and 107(4) of the Income Tax Act 1967 ('the Act') would be defeated.

Held:

[1] There is nothing in s. 83(3) of the Act which precludes an employer from amending the notice which he originally sent to the Director General. It is a matter of evidence over which notice is to be accepted. A genuine error may occur which necessitates an employer to correct the error.

[2] Section 83(3) of the Act merely requires an employer who is or is likely to be chargeable to tax in respect of his income in respect of gains or profits from the employment to give notice to the director general of its employee who is about to leave its employment. The reason being to enable the Inland Revenue to keep track of the said employee after his leaving the employment with the employer. For so long as the employee remains in the employment of the employer, s. 83(1) and (2) of the Act would enable the Inland Revenue to keep track of him. The said notice requires the employee's full name, address, the expected date of cessation and nothing more.

[2a] However, in the form devised for the purpose of the notice under s. 83(3) of the Act, apart from furnishing the aforesaid, the employer is also required to furnish other information of the employee, ie, the detail of his remuneration and emolument from the first day of the year of leaving service to the date of cessation of employment with the employer and the amount of moneys due to such employee and withheld by the employer. This additional information is clearly *ultra vires* s. 83(3) of the Act which the employer is not bound to comply more so in relation to the requirement as to the statement of the amount of moneys due to the employee and withheld by the employer for the purpose of s. 83(5) of the Act.

[2b] There is nothing in s. 83(5) that states that the amount of money required to be withheld, be notified to the Inland Revenue either through a notice under sub-s. (3) or through a separate notice. Further, s. 107(4) of the Act applies upon failure to comply with the requirement of the giving of the notice under s. 83(3) and (5) of the Act.

[Appeal dismissed.]

Legislation referred to:
Income Tax Act 1967, ss. 83(1), (2), (3), (4), (5), 107(4)

For the appellant - Abu Tariq Jamaluddin
For the respondent - Leong Yue Khau, Anthony; M/s Riza Leong & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman J:

This is an appeal by the appellant against the decision of the learned Sessions judge of 16 June 1997 on the interpretation of certain provisions of the Income Tax Act 1967 (hereinafter referred to as 'the Act'). The appellant filed a claim

pursuant to ss. 83(5) and 107(4) of the Act against the respondent to recover the amount of income tax due from the respondent's employee, Kee Wai Seng, out of the amount allegedly in the possession of the respondent on account of the employee leaving the employment of the respondent. The respondent by its statement of defence denied the claim on the ground that there was no money belonging to the employee in its possession to be forwarded to the appellant for such purpose. The basis of the claim of the appellant was on the information supplied by the respondent to the director general of Income Tax as contained in its Form CP22A of 2 January 1988 purportedly in compliance with s. 83(3) of the Act. The denial of the claim by the respondent is on the basis of its subsequent Form CP22A of 5 September 1988 declaring that no amount of moneys due to the said employee and withheld by it pursuant to s. 83(5) of the Act.

Before the hearing of the suit, it has been agreed by the parties and with the consent of the learned Sessions judge that the sole question of law which she has to decide is whether the Act allows the respondent to amend its Form CP22A. In the event that the decision is that the respondent is allowed to do so, the learned judge is to proceed to hear evidence on whether the respondent has in fact retained any moneys belonging to the tax payer. In the event that the decision is that the respondent is not allowed by law to amend its earlier Form CP22A of 2 January 1988, she shall order that judgment be entered against the respondent based on that earlier Form CP22A. The issue over the right to amend the notice in Form CP22A by a subsequent notice is crucial to the appellant in determining the fate of its pending action against the respondent in the suit. If the respondent is allowed to vary its original notification by subsequent Form CP22A, then the appellant may not succeed in its action against the respondent based on Form CP22A of 2 January 1988 as against the one submitted by the respondent to the appellant on 28 December 1987. After hearing the submissions by counsel representing the parties on the issue, the learned Sessions judge held that Form CP22A can be amended and ordered that the hearing of the action of the appellant be proceeded with. Hence this appeal. In her grounds of decision available in this appeal, the learned judge said:

> Maka adalah munasabah dan saksama diinterpretasikan yang Seksyen 83(3) dan Seksyen 83(5) yang tidak menyebut langsung tentang larangan untuk meminda CP22A, tidak menghalang majikan untuk mengemukakan pindaan kepada notis CP22A.

What she is saying is that as there is nothing in s. 83(3) and s. 83(5) to prohibit the amendment to Form CP22A, an employer is not prohibited from putting forward any amendment to the form. Before me and in the court below, the learned counsel for the appellant contends that if an employer is permitted

to amend the particulars in Form CP22A the purpose of ss. 83(5) and 107(4) is defeated. This is so because the appellant would be confronted with a complete defence concerning the direction of the director general under s. 83(5) of the Act based on the earlier Form CP22A submitted by the employer. Any suit against an employer based on s. 107(4) would be defeated by any amendment to Form CP22A subsequently made. Hence, it is his submission that allowing an employer to do so, would defeat the intention of Parliament in enacting ss. 83(5) and 107(4) of the Act. Considering the matter in the light of the relevant provisions of the Act, the decision of the learned judge is correct. Sections 83(3) and (5) state:

> (3) Where an employer is about to cease to employ an individual who is or is likely to be chargeable to tax in respect of income in respect of gains or profits from the employment, the employer shall not less than one month before the cessation give written notice thereof to the Director General stating the full name and address of the individual and the expected date of cessation:
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> Provided that, where he is satisfied that it is reasonable to do so in the circumstances, the Director General may accept for the purposes of this subsection a notice given less than one month before the cessation or a notice given on or after the cessation.
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> (5) Notwithstanding the provisions of any written law to the contrary, where an employer has in his possession any moneys whatsoever which are or may be payable to or for the benefit of an employee who has ceased or is about to cease to be employed by him ... he shall not, without the permission of the Director General, pay any part of those moneys to or for the benefit of the employee until ninety days after the receipt by the Director General of the notice required to be given under subsection (3) … and if at any time the Director General directs him to pay the full amount or a portion of those moneys towards payment of the tax payable by the employee, he shall pay as directed.

There is nothing in s. 83(3) which precludes an employer from amending the notice which he originally sent to the director general. It is a matter of evidence over which notice is to be accepted. A genuine error may occur which necessitates an employer to correct the error. The said subsection merely requires an employer having an employee who is or is likely to be chargeable to tax in respect of his income in respect of gains or profits from the employment to give notice to the director general of the employee who is about to leave his employment. The reason being to enable the inland revenue to keep track of the said employee after his leaving the employment with the employer. For so long as the employee remains in the employment of the employer, s. 83(1) and (2) would enable the Inland Revenue to keep track of

him. The notice that is required from the employer under s. 83(3) in relation to such an employee is his full name and address and the expected date of cessation and nothing more. However, the Inland Revenue has gone beyond that in devising a format for the purpose of the notice under s. 83(3) by requiring other particulars of the employee. This is beyond the permissible limit of the said subsection. I say "device" because it is conceded that Form CP22A used for the purpose of the subsection is not a prescribed form. In the said form, which is entitled "Notification under s. 83(3) of the Income Tax Act 1967", other than requiring the employer to state the full name and address of the employee leaving the service and the expected date of cessation as so required by s. 83(4), the employer is also required by the Inland Revenue to furnish other information relating to the affected employee, in particular, the detail of his remuneration and emolument from the first day of the year of leaving service to the date of cessation of employment with the employer and the amount of moneys due to such employee and withheld by the employer. This additional information is clearly *ultra vires* s. 83(3) of the Act which the affected employer is not bound to comply more so in relation to the requirement as to the statement of the amount of moneys due to the employee and withheld by the employer for the purpose of s. 83(5) of the Act. These extra information may be validly made under the Act under a specific provision contained therein.

Reading the provisions of s. 83(5) there is nothing in the subsection requiring an employer to supply such information to the Inland Revenue. Under the subsection, the employer is only required not, without the permission of the director general, to pay any part of any moneys in his possession which are or may be payable to or for the benefit of an employee who has ceased or is about to cease to be employed by him, until ninety days after the receipt by the director general of the notice required under sub-s. (3). There is nothing in sub-s. (5) to say that that amount of money required to be withheld, be notified to the Inland Revenue either through a notice under sub-s. (3) or through a separate notice. My attention has not been drawn to any provisions in the Act or in any regulations made thereunder that there exists such a requirement except for the devised Form CP22A. The employer having been required to abide by the provisions of sub-s. (5) mentioned earlier, is then required to pay the full amount or a portion of those moneys in his possession in respect of the employee, to the director general upon his direction of which direction the employer is obliged to comply. I realise the problem here as to how would the Inland Revenue know of the amount of such moneys in the possession of the employer. But short of a legislative provision to that effect, a devised form in the nature of Form CP22A would not solve the problem.

Knowing the amount of such moneys in the hand of the employer would help the inland revenue for the purpose of s. 107(4) of the Act which states:

> (4) An employer who fails to comply with section 83 (2), (3), (4) or (5) or this section with respect to an employee of his shall be liable, in the case of a failure to comply with section 83 (2), (3), (4) or (5), to pay the full amount of tax due from the employee and, in the case of a failure to comply with this section, to pay the amount of tax which he has failed to deduct:
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> Provided that –
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> (a) the Director General shall apply any amount paid to or recovered by him in pursuance of this subsection towards payment of the tax payable by the employee; and
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> (b) the employer may recover from the employee as a debt due to the employer any amount which has been paid to the Director General by the employer or recovered by the Director General from the employer in pursuance of this subsection.

Under sub-s. (4) an employer who fails to comply with the requirement of the giving of the notice under s. 83(3) as to the full name and address of the employee and the expected date of cessation of employment, and with the requirement of s. 83(5) as to the requirement to withhold the moneys of the employees in his possession and the compliance with the directive of the director general to pay the full amount or a portion of those moneys towards payment of the tax payable by the employee, is required to pay the full amount of tax due from the employee.

In the matter before the learned judge, based on Form CP22A of 2 January 1988 the respondent stated that it had in its possession the sum of RM85,539.30 on account of Kee Wai Seng who was expected to leave the employment of the respondent on 30 June 1988. Based on this information, the director general for the appellant directed the respondent by its letter of 30 December 1987 to transmit to him the sum of RM46,326.32 and to release the rest to the employee. This directive must have been done in pursuance to s. 83(5) of the Act. But the respondent failed to transmit the said sum to the director general. On 23 August 1988 there was a meeting held between the representative of the Inland Revenue and the representative of the respondent. Following that the respondent by its letter of 5 September 1988 informed the Inland Revenue that there was an error in the Form CP22A sent to the Revenue on 2 January 1988 and that the respondent had not received the directive of 30 December 1987 of the Revenue. With that letter the respondent

submitted an amended Form CP22A to the effect that there was no amount of moneys due to the employee and withheld by it pursuant to s. 38(5). This is clearly contrary to the statement made in the earlier Form CP22A of 2 January 1988 mentioned earlier. In the letter of 5 September 1988 the respondent explains the circumstances as there was a dispute as to the date of cessation of work by the employee and that the employee had taken an amount in excess of his entitlement and that the respondent has instituted an action against the said employee to recover a sum of RM246,535.58 from him. Receiving no remittance from the respondent pursuant to the directive of 30 December 1987 arising out of Form CP22A of 2 January 1988, the appellant on 9 April 1990 instituted this present claim to recover the sum of RM46,326.32 from the respondent. In the light of Form CP22A of 5 September 1988 from the respondent, the matter about its claim is crucial to the appellant. Hence the need for a decision on the preliminary issue of law from the learned Sessions judge.

In the light of my finding that the decision of the learned judge is correct on the preliminary issue, I have no alternative but to dismiss this appeal by the appellant with costs to the respondent. The action will proceed to trial before the learned judge for a decision based on the evidence to be tendered before her in relation to the claim by the appellant for the sum of RM46,326.32.